

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



12-26

74-2374

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PIETRO C. RUBINO, for himself and  
all other persons similarly  
situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-  
Appellant,

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

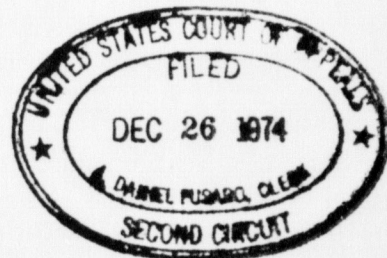
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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This Reply Brief is submitted by appellants Rubino and Zichello. The Municipal defendants and the State defendant have each submitted separate main briefs. Since they are duplicative, this Reply Brief shall concentrate on the points raised in the brief of the Attorney General.

ARGUMENT

Response to Attorney General's Point I

Appellants here respond to the arguments made in Point I of the Attorney General's brief.

In this point, the Attorney General appears to argue that this case is foreclosed because under State law, Judge Zichello "was not elected to a ten-year term, but rather a term which expired at the end of the year he reached 70" (AG 5).<sup>\*</sup> The Attorney General also argues that Judge Zichello has "been aware of necessity of the length of his term since entering office in 1970" (AG 6). Finally, the Attorney General concludes that Judge Zichello "must accept the political system as he finds it" (AG 9).

In other words, the challenged State law may continue to operate, and does not present a nonfrivolous constitutional question, because it has been operating all along and because the appellants knew of its existence. This is a classic bootstrap argument. It completely avoids an examination of the constitutional validity of the challenged statute. The same argument could be used to foreclose a challenge to all conditions on ballot access, no matter how absurd.

The school teachers in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), also knew of the pregnancy regulations when they took their job. No doubt, too, the state attorneys-general in Virginia and Ohio believed the regulations constitutional. However, this did not stop a challenge to them and their subsequent invalidation.

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<sup>\*</sup>Numberals preceded by AG refer to the Attorney-General's brief.

The Attorney General then argues (AG 6-8) that Weisbrod v. Lynn, \_\_\_ F. Supp. \_\_\_ (D.D.C. Oct. 11, 1974), and McIlvaine v. Commonwealth of Pennsylvania, 415 U.S. 986 (1974), mandate a dismissal of this case on the ground that the questions it presents are conclusively resolved. This is untrue. Appellants rely on their main brief for their contention that this case differs substantially from McIlvaine and Weisbrod. Neither of those cases involved First Amendment issues. Neither of those cases involved the right to run for elective office. See pages 8, 26-27 of appellants' main brief. Furthermore, appellants are informed by the attorneys for the Weisbrod plaintiff that that case is now on appeal to the United States Supreme Court.\*

Gordon v. Leatherman, 450 F. 2d 562 (5th Cir. 1971), cited in appellants' main brief at pages 28-29 and in the Attorney General's brief at pages 9 and 23, supports the claim made here. Recall is entirely consistent with the political process through which an elected official obtains his position. But a state-imposed mandatory retirement statute is not part of that "political process." It forces departure from office regardless of the wishes of the people, the very interest which recall is intended to further. Appellants rely on the Gordon holding that

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\*At oral argument, appellants will hand up the as yet unreported Weisbrod decision and a copy of the jurisdictional statement in McIlvaine, upon which Weisbrod relied.

Judge Zichello had a property interest in his job and on the distinction, made in their main brief, between recall and mandatory retirement statutes.

Response to Attorney General's Point II

Unable to find a justification for the State mandatory retirement statute in the State legislative history, the Attorney General relies on congressional hearings leading to establishment of a mandatory retirement age for the federal civil service (Ag 10-17). Appellants are not sure exactly what value this analysis has. Civil servants are not elected. The First Amendment is inapplicable to mandatory retirement statutes applied to them. In addition, there is no indication whatsoever that New York State had similar reasons for imposing the mandatory retirement statute involved here. In fact, the law here is so old that it is doubtful that anyone knows the reasons for it.

The Attorney General conjectures that (AG 13) one rational basis for the mandatory retirement statute is that it gives younger members of the civil service or lawyers a chance to become judges. This can also be done in a manner less intrusive on appellants' constitutional rights. The State can simply limit the number of terms for which a candidate can run for judge, thereby giving all a chance and discriminating against none.

Since the State has chosen to make the position elective, the decision whether to continue an older candidate in office over a younger candidate is one for the voters, either in a primary or general election. Once the elective process is chosen as the manner to fill a position, the courts will impose requirements not necessarily present where the officeholder is selected in another way. See page 17 of appellants' main brief.

Although the Attorney General says that the mandatory retirement law is not based on a presumption of the ability of a 70-year-old person to occupy the office, he proposes (AG 17) that the "rational basis" for the law is "the promotion of the efficiency of public employees and the provision for the material welfare of those employees." Furthermore, he rejects (AG 24) a proposal that certification might be constitutionally less intrusive than a blanket exclusion. He says: "To examine each judge's health or capacity would mean that the senile and debilitated would continue to serve to the detriment of the administration of justice through appeals and the like."

The Attorney General can't have it both ways. Does the law irrebuttably presume that men and women over age 70 are "senile and debilitated" or does it not? If it does, it falls under the La Fleur test. If it does not, certification is a sensible alternative to a blanket exclusion, and is in fact now used for some judges.

The Attorney General argues that strict scrutiny is not required because appellants' First Amendment rights are not involved (AG 19-21). But none of the cases he cites involved First Amendment issues and he cites no case saying that such rights are absent. None of the plaintiffs in the cited cases were office holders or office seekers. They were civil servants or union members or prospective teachers.

Appellants have cited cases (at pages 9-13) of their main brief which hold that the right to be a candidate for and hold public office are First Amendment rights. Appellants continue to rely on those cases and the arguments in those pages.

The Attorney General next contends (AG 21-23) that the State law is not based on an irrebuttable presumption. Nevertheless, as shown above, he conveniently uses this presumption when it suits his purpose.

In responding to appellants' "irrebuttable presumption" argument, the Attorney General misconstrues the issue. He says age is not a suspect classification and therefore the "higher standard" does not apply. Appellants do not claim that age alone is a suspect classification. The existence of a suspect classification is not the only fact that invokes the more stringent Equal Protection test. Distinctions that affect a fundamental right must also serve a compelling state interest. As appellants argue (pages 23-27 of their main brief), the distinctions here

affect the fundamental rights to vote and to run for office. This, not the suspect classification of age, is what requires strict scrutiny.

The Attorney General cites Rosario v. Rockefeller, 410 U.S. 752 (1973), for the contention that the State is free to choose effective means to accomplish its purpose (AG 24). What is its purpose? To avoid "senile and debilitated" judges. Assuming that this goal does not involve an irrebuttable presumption, certification - the kind of individualized treatment La Fleur requires - is now successfully used to assure ability. The holding in Rosario, that it is constitutional to require persons to register to vote in a party primary eight months prior to the primary, really, as the Attorney General concedes, has no application to this case.

The Attorney General cites Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973) aff'd. 414 U.S. 802 (1973). He cites it in response to appellants' argument (pages 19-23 of their main brief) that limitations on candidacy must be weighed by reference to the State's power to impose the same disability on voters. Chimento upheld a seven year durational residence requirement for candidacy for Governor. The Attorney General argues that obviously the State could not impose the same residence requirement in order to vote for Governor. This is true. But appellants do not argue that there is an exact parallel between the constitutionality of a qualification on candidacy and the same

qualification on voting. Obviously, the results may differ because a candidate is not a voter. It is, for example, valid to require a Civil Court Judge to be a lawyer, but invalid to require voters for that position to be lawyers.

Appellants do argue, however, that the tests applied must be the same. In Chimento, the Court recognized that the compelling state interest test must be applied to the challenge to the durational residence requirement because of the notable effect that requirement had on both candidates and voters. In Human Rights Party v. Secretary of State, 370 F. Supp. 921 (E.D. Mich. 1973), the Court, after going through the same detailed analysis discussed in the appellants' main brief, finally concluded that an age minimum on the right to run for office would be sustained if there was a rational basis for it. The Court reached this result after noting that the rational basis test was the one used by the controlling plurality of the Supreme Court in Oregon v. Mitchell, 400 U.S. 112 (1970). Since the rational basis test applied to minimum ages for voting, it would also apply to statutes imposing minimum ages for candidacy.

Just as in Chimento the compelling state interest test applied to a durational residency requirement for candidates because it would for voters, and just as in Human Rights Party, the rational relation test applied to minimum age requirements for candidates because it would

also apply to such requirements for voters, so, here, since the compelling State interest would have to apply to any attempt to curtail the right to vote on the basis of maximum age, it must also apply to any attempt to curtail the right to be a candidate on the same basis. As the Human Rights Party Court said: ". . . the compelling interest standard is applicable to a statutory restriction on candidacy if that restriction has an indirect discriminatory impact of the sort which, had it resulted directly from a statute limiting the right to vote, would require application of the stricter standard of review of that statute."

The New York Court of Appeals itself would agree. In Atkin v. Onondaga County Board of Elections, 30 N.Y. 2d 401, 404 (1974), the Court said:

Though the States have the recognized authority to establish the conditions under which the right to vote may be exercised . . . any restriction, be it age, duration of residency or residency itself which would have the effect of denying the franchise to any group, in order to muster constitutional scrutiny "must [be] . . . 'necessary to promote a compelling state interest.' [Emphasis added.]\*

The Chimento Court, after a careful analysis, concluded that the durational residence requirement for candidacy for Governor was constitutional under the compelling state interest test. It based its decision, in part, on the fact that the restriction created no "outright

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\*Notably, the State court cited the Supreme Court's plurality opinion that even a minimum age limit invoked the compelling interest test.

ban" on candidacy for Governor but only "delays" the time at which a person may become a candidate. It noted, further, that in the meantime the individual could seek lower State office. 353 F. Supp. at 1216. By contrast, the law here does create an "outright ban" on the ability of a person over age 61 to seek or complete a full term on the New York City Civil Court. Nor is there any other court in the State on which a lawyer can seek a seat. Unlike the Chimento facts, we here deal with a blanket exclusion on the right to participate in the political process by running for a position the State has chosen to make elective - Judge.

#### CONCLUSION

The discussion in appellants' main brief and this brief certainly proves at least one thing. The issues raised by this case are not frivolous. If they are not frivolous, appellants are entitled to a three-judge court. Goosby v. Osser, 409 U.S. 512, 6 (1973). Whatever may be the effect of Weisbrod, McIlvaine and other tangentially related cases cited by respondents, they in no way make this claim insubstantial. A claim is insubstantial under Goosby only if its "soundness so clearly results from the previous decisions of the [Supreme Court] as to foreclose the subject and leave no room for the

inference that the questions sought to be raised can be  
the subject of controversy."

Respectfully submitted,

STEPHEN GILLERS  
Attorney for Plaintiffs-  
Appellants

Dated: New York, New York  
December 30, 1974

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SERVICE BY MAIL

Docket No. 74-2374

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Defendants-Appellees.

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STATE OF NEW YORK )  
                          ) ss.:  
COUNTY OF NEW YORK )

ANN M. GERLOCK, being duly sworn, deposes and says:  
deponent is not a party to the action, is over 18 years of  
age and resides at 418 East 81 Street, New York, New York  
10028.


On the 26th day of December, 1974, deponent served  
the within Reply Brief upon

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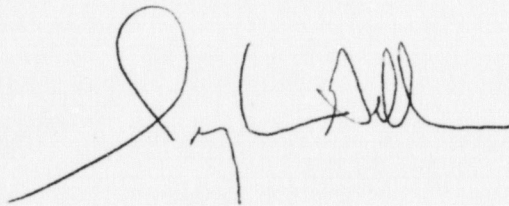
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at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

  
ANN M. GERLOCK

Sworn to before me this  
26th day of December, 1974.



STEPHEN GILLERS  
Notary Public, State of New York  
No. 31-4507113  
Qualified In New York County  
Commission Expires March 30, 1975

